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FILED
JUL 19 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-2073

UNITED STATES SUPREME COURT
AUGUST TERM 1982

NICK DEMOS,

Plaintiff-Petitioner,

vs.

COMMERCIAL UNION INSURANCE COMPANY, INC.,

Defendant-Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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LISTING OF INTERESTS

Defendant-Respondent COMMERCIAL UNION INSURANCE COMPANY, [incorrectly designated COMMERCIAL UNION INSURANCE COMPANY, INC.] is a wholly owned subsidiary of Commercial Union Corporation, a Delaware Corporation.

Subsidiaries (other than wholly owned) of Defendant-Respondent COMMERCIAL UNION INSURANCE COMPANY are:

1. Echlin, Irvin & Crowell & Company, a Texas Corporation;

2. Bishop Insurance Agency, Ltd., a Hawaiian Company.

All affiliates of Defendant-Respondent COMMERCIAL UNION INSURANCE COMPANY are sister corporations and wholly owned by Commercial Union Corporation. These are:

Commercial Union Special Risks, Inc.

Commercial Union Personal Lines, Inc.

Special Underwriting Group, Inc.

Commercial Union Lines, Inc.

Commercial Union Leasing Corporation

Commercial Union Management, Inc.

American Employers Insurance Company

Beacon Advertising Corporation

The Employers Fire Insurance Company

Falcon Special Services Insurance Agency

Falcon Insurance Company

The Northern Assurance Company of America

Beacon Risk Management Services, Inc.

Commercial Union Investment Management Corporation

Eggret Holding Corporation

Commercial Union Automation Services Inc.

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Section 802.03(2), Wis. Stats., 1979-80 3, 8

ISSUES PRESENTED

Defendant-Respondent, COMMERCIAL UNION INSURANCE COMPANY, (hereinafter COMMERCIAL UNION) accepts plaintiff-petitioner, NICK DEMOS' (hereinafter DEMOS) statement as to the questions presented for review.

STATUTES INVOLVED

There are no federal constitutional provisions or federal statutes involved. However, Rules 8(c) and 9(b) Fed.R.Civ.P. are pertinent to COMMERCIAL UNION'S defense in this case.

8(c) Fed.R.Civ.P. provides:

> "Affirmative Defenses. In pleading to a preceeding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statutes of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires,

shall treat the pleading as if there had been a proper designation."

9(b) Fed.R.Civ.P. provides:

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Wisconsin Statutes pertinent to the case are Section 802.02(3), Wis. Stats., 1979-80 and Section 802.03(2), Wis. Stats. 1979-80.

Section 802.02(3), Wis. Stats., 1979-80, provides:

"(3) AFFIRMATIVE DEFENSES. In pleading to a preceeding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of a condition subsequent, failure or want of consideration, failure to mitigate damages, fraud, illegality, immunity, incompetence, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, superseding cause

and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation. If an affirmative defense permitted to be raised by motion under s. 802.06(2) is so raised, it need not be set forth in a subsequent pleading."

Section 802.03(2), Wis. Stats., 1979-80, provides:

"(2) FRAUD, MISTAKE AND CONDITION OF MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

STATEMENT OF THE CASE

COMMERCIAL UNION accepts DEMOS' statement of the case for the purposes of this Petition only and without agreeing to the truth of all the assertions contained therein.

REASONS FOR DISALLOWANCE OF WRIT

UNITED STATES SUPREME COURT REVIEW IS NOT APPROPRIATE IN THIS CASE.

Review of this case by the United States Supreme Court is not appropriate. There is no basis or need for review. There is only one question presented involving federal law. That question involves the jurisdiction of a U.S. District Court to hear and make appropriate findings upon COMMERCIAL UNION'S affirmative defenses of fraud, arson and illegality set up in companion cases involving DEMOS and COMMERCIAL UNION. The other questions presented involve Wisconsin's common law of defamation.

I. FEDERAL DISTRICT COURT HAS JURISDICTION OVER THE CASE.

28 U.S.C. Section 1332 provides that federal district courts shall have original jurisdiction of all civil actions were the matter in controversey exceeds the sum of $10,000 and is between citizens of different states. DEMOS is a resident of the State of Wisconsin. COMMERCIAL UNION is a

resident of the State of Massachusetts. The amount demanded by DEMOS as relief in the two civil actions exceeds $10,000. The diversity and monetary requirements of 28 U.S.C. Section 1332 are satisfied. The federal district court has jurisdiction over the two civil actions, the affirmative defenses to which, DEMOS now complains of.

DEMOS does not dispute the fact that the district court has jurisdiction over the two civil cases, which are still pending. DEMOS contends that the district court does not have jurisdiction over the affirmative defenses set forth by COMMERCIAL UNION and thus COMMERCIAL UNION is not privileged in making those 'libelous' assertions. Those affirmative defenses set up fraud, arson and illegality on the part of DEMOS. COMMERCIAL UNION contends that since the district court has jurisdiction of the cases, COMMERCIAL UNION is privileged to assert affirmative defenses

which are pertinent to these cases. Not only is COMMERCIAL UNION privileged to assert these affirmative defenses, but it is required to do so.

Rules 8 and 9, Fed.R.Civ.P. pertain to the form and content of pleadings in civil cases over which district courts have jurisdiction. Rule 8(c) requires that:

> "In pleading to a preceeding pleading, a party shall set forth affirmatively. . .fraud [and] illegality. . ."

Rule 9(b), Fed.R.Civ.P. states:

> "In all averments of fraud. . ., the circumstances constituting fraud. . .shall be stated with particularity."

A failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. Henry vs. First Nat. Bank of Clarksdale, (C.A.5th, 1979), 595 F.2d 291, certiorari denied 100 S.Ct. 1020, 444 U.S. 1974, 62 L.Ed. 756; Radio Corp. of America

vs. Radio Station KYFM, Inc., (C.A.7th, 1943), 132 F.2d 829. This proposition has been announced by numerous federal courts in cases involving a variety of affirmative defenses including illegality. Stanish vs. Polish Roman Catholic Union of America, (C.A.7th, 1973), 484 F.2d 713; Seaboard Sur. Co. vs. Harbison, (C.A.7th, 1962), 304 F.2d 247; Howard Indus. Inc. vs. Rae Motor Corp., (C.A.7th, 1959), 267 F.2d 430. Additionally, the failure to plead arson as an affirmative defense has been held, in at least one state, to bar admission of evidence of intentional burning by an insured. Fleming vs. Unigard Mutual Ins. Co., 44 Or.App. 197, 605 P.2d 728 (1980), citing Walker vs. Fireman's Fund, 114 Or. 545, 234 P. 542 (1925).

It should be noted that COMMERCIAL UNION'S Answer and Affirmative Defenses in Wells vs. Commercial Union, Nick Demos and Lighthouse, Inc., (Case No. 81-C-592) and complained of in paragraph Fourth of

DEMOS' defamation Complaint, was filed in the Circuit Court of Racine County, State of Wisconsin before the case was removed to the U.S. District Court, Eastern District of Wisconsin. That answer was filed pursuant to the Wisconsin Rules of Civil Procedure, Chapters 801 to 807, Wis. Stats. (1979-80). Section 802.02(3), Wis. Stats., is substantially identical to Rule 8(c), Fed. R.Civ.P., and requires in the state courts of Wisconsin:

> "Affirmative Defenses. In pleading to a preceeding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: . . .fraud [and] illegality."

Section 802.03(2), Wis. Stats., is identical to Rule 9(b), Fed.R.Civ.P., and requires in the state courts of Wisconsin:

> "In all averments of fraud and mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . ."

COMMERCIAL UNION was required under both federal and state civil procedure rules and applicable case law to plead its affirmative defenses of fraud, arson and illegality. Arson is a species of fraud. Klemens vs. Badger Mutual Insurance Company of Milwaukee, 8 Wis. 2d 565, 99 N.W. 2d 865 (1959).

DEMOS does not dispute that the common law of Wisconsin grants an absolute privilege to statements pertinent to the action.[1] The Court of Appeals correctly pointed out that

> "The absence-of-jurisdiction exception to the privilege is limited to those cases in which the court does not have jurisdiction over

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[1]The privilege is suject to the qualification that such defamatory matter is pertinent or relevant to the case. Schafer vs. Suckle, 21 Wis. 2d 425, 124 N.W. 2d 577 (1963); Bromund vs. Holt, 24 Wis. 2d 336, 129 N.W. 2d 149 (1964); Novick vs. Becker, 4 Wis. 2d 432, 90 N.W. 2d 620 (1958); See also Bussewitz vs. Wisconsin Teachers Association, 188 Wis. 121, 205 N.W. 808 (1925).

> the suit. Kent vs. Connecticut Bank and Trust Co., 386 So. 2d 902 (Fla. Dist. Ct. App. 1980). . ."

Court of Appeals Decision, Plaintiff-Petitioner NICK DEMOS' Appendix, p. 3. Kent vs. Connecticut Bank and Trust Co., supra., cited by DEMOS, as well as all the other cases cited in DEMOS' Petition, pp. 10-14 reaffirms this principle. The privilege applies if the court, in which the statements complained of were made, has jurisdiction of the case, and the statements were pertinent to the case.

Not only has the United States District Court and the Court of Appeals applied the law correctly, DEMOS has not demonstrated that the application of the law is in conflict with other court decisions or that the Court of Appeals decision strays from the usual course of judicial proceedings.

II. THE DECISION OF THE UNITED STATES DISTRICT COURT AND THE COURT OF APPEALS INVOLVED WISCONSIN COMMON LAW ONLY

The United States District Court

and The Court of Appeals applied Wisconsin common law in reaching their respective decisions. Those decisions held that the alleged dissemination of the contents of COMMERCIAL UNION'S Answer and Affirmative Defenses is without liability. As pointed out by both courts, once the pleadings were filed in court, they became public records, available to all, to see and read. Court of Appeals Decision, Plaintiff-Petitioner NICK DEMOS' Appendix, pp.4-5; District Court Decision, Plainitff-Petitioner, NICK DEMOS' Appendix pp 13-14.

This question is a matter of state law. No questions or issues of federal law or policy are involved in this matter. There are no conflicting federal court decisions to reconcile. There is no reason or need for the United States Supreme Court to review this case.

CONCLUSION

The Federal District Court has

jurisdiction of the case. This jurisdiction attached to all of the affirmative defenses set forth by COMMERCIAL UNION. COMMERCIAL UNION was not only privileged, but required, to protect its rights, to set forth the affirmative defenses. The holding of the District Court and Court of Appeals is consistent with the law on this question. The balance of this case involves questions of Wisconsin common law of defamation.

The plaintiff-petitioner has failed to establish any basis or need for review of this case. There are no questions or issues of federal law or constitutional provisions. No conflict exists between this decision and that of other federal courts. The decision in this case is a matter of state law only. There is no need for review by the United States Supreme Court.

RESPECTFULLY SUBMITTED,

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